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# Congressional Attempts to Amend the Clean Water Act: American Wetlands under Attack

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# CONGRESSIONAL ATTEMPTS TO AMEND THE CLEAN WATER ACT: AMERICAN WETLANDS UNDER ATTACK

## I. INTRODUCTION

Forty percent of the nation's wetlands have already been irretrievably lost, with the remainder disappearing at an annual rate of 300,000 to 400,000 acres.[1] The future of wetlands and their protection will become more uncertain if House of Representatives, Federal Bill 961 (unenacted) [hereinafter H.R. 961],[2] recently passed by Congress to amend the Clean Water Act,[3] becomes law. These amendments drastically change the regulation of remaining wetlands by altering the existing provisions which govern the issuance of permits to fill wetlands.[4] The initial creation and adoption of the Clean Water Act left the area of wetland regulation vague and ambiguous.[5] Due to this vagueness, it has since been the responsibility of various regulating authorities to define and interpret regulation requirements for the dredging and filling of wetlands.[6] To this end, part II of this article addresses the current permitting regulations for the dredging and filling of wetlands. Part III outlines the rationale utilized by the courts to uphold the Army Corps of Engineers [hereinafter the Corps] and the Environmental Protection Agency's [hereinafter EPA] jurisdiction over the permit process for the dredging and filling of wetlands. Part IV analyzes H.R. 961 961 and the changes that will occur in the permitting process if President Clinton signs H.R. 961 into law.[7] Finally, Part V addresses alternatives to H.R. 961.

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1. WILLIAM H. RODGERS JR., ENVIRONMENTAL LAW § 4.6 n.23 (2d ed. 1994).

2. H.R. 961, 104th Cong., 1st Sess. (1995) (creating the Comprehensive Wetlands Conservation and Management Act of 1995). Although there are numerous other aspects of 1995 H.R. 961, this Note will center around the modifications to wetlands protection.

3. 33 U.S.C. § 1251 (1988).

4. H.R. 961 § 801. *See infra* part IV (discussing the creation of the Comprehensive Wetlands Conservation and Management Act of 1995 and the modifications suggested by Congress for classification and permitting of wetlands).

5. *See* 33 U.S.C. § 1251 (1988) (failing to include wetland regulation within its provisions).

6. *See infra* part II (discussing the current regulation process for the dredging and filling of wetland areas).

7. A presidential veto of H.R. 961 is quite likely. *See* Craig Quintana, *Effort to Revamp 1972 Clean Water Act Draws Fire. Some Insist the Law Imposes Unnecessary Restrictions. Its Backers Say Pollution Would Increase if the Law is Changed*, ORLANDO SENTINEL, May 21, 1995, at B1 (discussing President Clinton's reaction to H.R. 961 and his promises to veto the legislation). Given the enthusiasm with which Congress attempts to change the manner of regulating activities in wetland areas, even if a presidential veto does occur, there is sure to be alternatives to H.R. 961 in the near future. *Id.*

## II. CURRENT PROCESSES FOR OBTAINING A PERMIT FOR THE DREDGING AND FILLING OF WETLAND AREAS

The primary goal of the Clean Water Act is "to maintain the chemical, physical, and biological integrity of the Nation's waters."[8] To preserve the integrity of the nation's waters, Congress has prohibited any discharge of dredged[9] or fill materials[10] into "navigable waters" unless the discharge is authorized by a permit.[11]

### A. INTERPRETING THE CLEAN WATER ACT TO REQUIRE A PERMIT FOR THE DREDGING AND FILLING OF WETLANDS

Navigable waters are defined as the waters of the United States, including the territorial seas.[12] Based on this definition, it appears that the drafters of the Clean Water Act did not specifically include wetland protection in the permitting process.[13] However, the goal of the Clean Water Act is to protect the waters of the United States.[14] The Code of Federal Regulations defines "waters of the United States" to include all interstate waters including interstate wetlands and wetlands adjacent to waters of the United States.[15] As such, it appears that wetlands fall within the protection of the Clean Water Act's permit process to further the primary goal of the Clean Water Act.

Wetlands are defined as areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to, and under normal circumstances, do sustain a prevalence of vegetation adapted to live in consistently saturated soil conditions.[16] The proximity of the wetland area to other waters is a factor in the determination of the Corps' jurisdiction. Adjacent wetlands are those which border or are otherwise contiguous to other waters of the United States separated from those waters by man-made dikes or barriers, natural river berms, beach dunes, and the like.[17] Isolated wetlands are areas not part of a surface tributary system or other navigable water and are not adjacent to such

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8. 33 U.S.C. § 1251 (1988).

9. 33 C.F.R. § 323.2(d)(1) (1995) (defining the phrase "discharge of dredged material" as the addition, including any redeposit of dredged material, into the waters of the United States). Dredged material means material that is excavated or dredged from waters of the United States. *Id.* § 323.2(c).

10. *Id.* § 323.2(e). The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. *Id.*

11. 33 U.S.C. § 1344 (1988).

12. *Id.* § 1362(7).

13. *See id.* § 1344 (requiring disposal permits for navigable waters).

14. *Id.* § 1251.

15. 33 C.F.R. § 328.3(a)(2), (7) (1995).

16. *Id.* § 328.3(b).

17. 40 C.F.R. § 230.3(b) (1995).

tributary waterbodies.[18] The Corps has the authority to regulate activities in the waters of the United States, however, the proximity of the wetland to other waters is a factor for determining whether the Corps has jurisdiction.[19]

A broad interpretation of the Corps' jurisdiction over waters and adjacent wetlands aids in the restoration and maintenance of the nation's waters. By broadly defining "waters of the United States," numerous unintended waters may fall within the jurisdiction of the Corps. However, the alternative is a rigid definition where development will result in filling thousands, if not millions, of wetland acres. Clearly, the loss of extensive wetland areas would defeat the Clean Water Act's goal of maintaining the integrity of the Nation's waters.[20] In fact, some courts have taken this interpretation one step further to conclude that Congress intended to extend the Corps' jurisdiction under the Clean Water Act to the maximum extent possible.[21] In order for activities to be allowed in most wetland areas, a permit for the specified activity is required.

### B. THE PERMIT PROCESS

In order to initiate certain activities in wetland areas, a permit for the activity is required.[22] There are standard procedures and time frames for the granting or denying a permit.[23] Even though the permitting process appears difficult and time consuming, the alternative involves the con-

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18. 33 C.F.R. § 330.2(e) (1995). *See infra* part III (discussing the classification system used by the Corps in the determination of jurisdictional matters).

19. 33 U.S.C. § 403 (1988). This section provides that certain activities in the waters of the United States are prohibited, unless recommended by the Chief of Engineers and authorized by the Secretary of the Army. *Id.* Included in these prohibited activities is the excavation or fill of the waters of the United States. *Id.*

20. 33 U.S.C. § 1251(a) (1988). *See supra* note 8 and accompanying text (discussing the goals of the Clean Water Act).

21. *See* Consolidation Coal Co. v. Costle, 604 F.2d 239 (4th Cir. 1979), *rev'd*, 449 U.S. 64 (1980) (finding the Federal Water Pollution Control Act should be given the broadest possible reading consistent with the Commerce Clause); Minnesota v. Hoffman, 543 F.2d 1198 (8th Cir. 1976), *cert. denied*, 430 U.S. 977 (1977) (finding Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), were intended to extend the Act's jurisdiction to the constitutional limit); United States v. Sargent County Water Resource Dist., 876 F. Supp. 1081 (D.N.D. 1992) (holding that Congress intended to extend jurisdiction of CWA to the constitutional limit); United States v. Zanger, 767 F. Supp. 1030 (N.D. Cal. 1991) (finding that Congress intended that the term "waters of the United States" within the CWA be interpreted as broadly as constitutionally possible under the Commerce Clause); Parkview Corp. v. Department of Army Corps of Eng'rs, 469 F. Supp. 217 (E.D. Wis. 1979) (following the holding in *Hoffman* that by enacting the 1972 amendments to the Federal Water Pollution Control Act, Congress intended to extend the Act's jurisdiction to the constitutional limit). *See infra* part III (discussing the courts interpretation of the Corps' jurisdiction).

22. *See generally* Ted Griswold, Comment, *Wetland Protection Under Section 404 of the Clean Water Act: An Enforcement Paradox*, 27 SAN DIEGO L. REV. 139 (1990) (discussing agency conflicts in the enforcement of Clean Water Act provisions).

23. 33 C.F.R. § 325.2 (1995) (describing the processing of applications).

tinued loss of valuable wetland areas. The permitting process is initiated when an application is filed with the Corps.[24]

### C. THE APPLICATION

Pursuant to the National Environmental Policy Act of 1969,[25] a permit requires that either an environmental assessment or an environmental impact statement [hereinafter EIS] be completed.[26] The district engineer reviews the application for completeness and within fifteen days, issues public notice of the proposed activity unless the activity is specifically exempted or the application is incomplete.[27] By giving public notice, the district engineer encourages society to comment on the project.[28] The comment period runs for a reasonable time not exceeding thirty days but cannot be less than fifteen days from the date of notice.[29] The district engineer accepts and reviews any comments made pursuant to this notice.[30] These comments are made available to the applicant, who may then contact anyone objecting to the project.[31] Ultimately, the comments become part of the administrative record.[32]

When the comment period ends, the district engineer prepares either a statement of findings, or where an EIS has been completed, a record of decision which includes the district engineer's views of the project's effect on the public interest including conformity with the guidelines published for the discharge of dredged or fill material into waters of the United States.[33] Specifically, if the permit is contrary to state or local decisions, the district engineer includes the significant national issues and explains how these issues are of overriding importance.[34] If the district engineer determines that a significant interest in the outcome of the permit process exists, the district engineer makes the decision available to the media or other interested parties, by informing the parties that it is only a recommendation and not a final decision.[35] "District engineers

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24. *Id.* § 325.2.

25. 42 U.S.C. § 4332 (1988).

26. 33 C.F.R. § 325.2(a)(4) (1995). *See infra* note 40 and accompanying text (discussing the relevance of the environmental impact statement).

27. 33 C.F.R. § 325.2(a)(1),(2). The authority for administering the Corps' regulatory program is delegated to 36 division engineers and 11 district engineers. *Id.* § 320.1(a)(2). These district engineers are authorized by the Corps to issue formal determinations concerning the applicability of the Clean Water Act in the permitting of proposed activities. *Id.* § 320.1(a)(6).

28. *Id.* §§ 325.2(a)(2), (3).

29. *Id.* § 325.1(d)(2).

30. *Id.* § 325.2(a)(3).

31. *Id.*

32. 33 C.F.R. § 325.2(a)(3).

33. *Id.* § 325.2(a)(6). These records also include the conformity of the project to § 404(b)(1) guidelines. *Id. See infra* part II.C.2 (discussing the § 404(b)(1) guidelines).

34. 33 C.F.R. § 325.2(a)(6).

35. *Id.* If the district engineer determines there is a potential impact to a threatened or

will decide on all applications not later than sixty days after receipt of a complete application."[36] The district engineer then forwards the entire administrative record to the agency official authorized to make the final decision.[37]

If the agency official denies the permit, the applicant receives written notice of the denial as well as the reasons for denial.[38] However, if the agency grants the permit, the applicant receives a standard form permit which lists any limitations placed on the activity.[39]

### 1. *The Environmental Impact Statement*

The EIS includes the environmental impact of the proposed action.[40] Included in the EIS are any adverse environmental effects which cannot be avoided, alternatives to the proposed action, the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments or resources involved in the proposed action.[41] After the completion of an EIS or a determination that an EIS statement is not required, the district engineer looks to the guidelines set forth in the Clean Water Act Section 404(b)(1) to make the decision to issue or deny a permit.[42]

### 2. *Consideration of Guidelines*

Section 404(b)(1) guidelines were developed for the purpose of evaluating disposal sites including dredge and fill activities pursuant to the Clean Water Act.[43] Generally, these guidelines state that a permit

endangered species pursuant to section 7 of the Endangered Species Act, the district engineer will initiate formal consultation procedures with the U.S. Fish and Wildlife Service or National Marine Fisheries Service. *Id.* § 325.2(b)(5).

36. *Id.* § 325.2(d)(3). This 60 day period may be adjusted upon various findings including: the procedure is precluded as a matter of law, the case must be referred to a higher authority, the comment period is extended, a timely submittal of information or comments is not received from the applicant, the processing is suspended at the request of the applicant, or information needed by the district engineer for a decision on the application cannot reasonably be obtained within the 60 day period. *Id.*

37. *Id.* § 325.2(a)(6).

38. *Id.* § 325.2(a)(7).

39. 33 C.F.R § 325.2(a)(7). "The permit is not valid until signed by the issuing official." *Id.* A list of all permits which are granted or denied is published monthly. *Id.* § 325.2(a)(8). Included in this publication is information regarding the availability of statements of findings and records of decisions. *Id.*

40. 42 U.S.C. § 4332(C) (1988). The basic functions of environmental impact statements (EIS's) are to aid in the decision making process and to provide the public with information in order to encourage public participation. *See* Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974) (stating the basic purposes of the EIS).

41. 42 U.S.C. § 4332 (C).

42. *See infra* part II.C.2 (discussing the § 404(b)(1) guidelines).

43. 33 U.S.C § 1344(b) (1988) (giving the authority to the Administrator to issue guidelines). The guidelines indicate that:

should not be granted unless the applicant demonstrates that any dredge or fill operations will not have an unacceptable adverse impact on the ecosystem.[44] Whenever dredged or fill material is introduced into a wetland area, it is likely to adversely impact the area. These guidelines attempt to specify when such adverse impacts become unacceptable.

The guidelines state that a permit will not be granted if a practical alternative to the proposed action exists and the alternative has a less adverse impact on the ecosystem.[45] This practicable alternatives test has been described as essentially a land use planning overlay.[46] The practicable alternatives test ranks alternative sites or project configurations for developments that require discharge into wetlands.[47] When filling can be avoided, alternatives with the least adverse environmental impacts should be selected for development.[48] The purpose of the project is to determine the available alternatives.[49] In the past, deference was given to the applicant's classification of the purpose.[50] Therefore, the purpose of the project is significant to the granting of a permit because it identifies whether practicable alternatives exist.[51] The Corps now exercises its judgment regarding the basic purpose and need for the project, considering both the applicants and the public's interests.[52]

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(a) The purpose of these Guidelines is to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material.
(b) Congress has expressed a number of policies in the Clean Water Act. These Guidelines are intended to be consistent with and to implement those policies.
(c) Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.
(d) From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.

40 C.F.R. § 230.1 (1994).

44. *Id.*

45. *Id.* § 230.10(a).

46. Luke Danielson & Mary Lou Nordell, *Wetlands Litigation: Current Issues and New Directions*, C855 A.L.I. A.B.A. 341, 350 (1993).

47. *Id.*

48. *Id.*

49. *Id.* at 351.

50. *Id.*

51. Danielson & Nordell, *supra* note 46, at 351.

52. *Id.* (citing 33 C.F.R. § 325, app. B(9)(c)(4) (1992)).

In the development of wetland protection, the Corps balanced alternatives and considered economic and environmental factors involved in applying to fill wetland areas.[53] The granting of a permit depends on the availability of practical alternatives having a less adverse impact on the ecosystem.[54] An application of the practicable alternatives consideration was addressed in *O'Connor v. Corps of Engineers, United States Army*.[55] In *O'Connor*, the court addressed the practicable alternatives critical in the denial of a permit for the building of a swimming pool, jogging track, and tennis court on an Indiana wetland.[56]

The court found that the Corps made a reasonable determination that the danger to the surrounding aquatic resources by the dredge and fill project outweighed the benefits of the project.[57] The court upheld the Corps' finding that O'Connor failed to address existing, practicable alternatives, and that the foreseeable adverse impacts that the project

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53. 40 C.F.R. § 230.10 (1994). The practical alternative analysis is further expounded:

> (2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.
>
> (3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in Subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

40 C.F.R. § 230.10(a)(2), (3) (1995). *See also* Town of Norfolk v. United States Army Corps of Eng'rs, 968 F.2d 1438, 1454 (1st Cir. 1992) (finding the Corps conducts a general balancing of economic and environmental factors and its ultimate determinations are entitled to substantial deference).

54. 40 C.F.R. § 230.10(a).

55. 801 F. Supp. 185 (N.D. Ind. 1992).

56. O'Connor v. Corp of Eng'rs, United States Army, 801 F. Supp. 185, 195 (N.D. Ind. 1992). In May of 1989, O'Connor, a home owner, began filling a portion of the wetland on Sagauny Lake in LaPorte County, Indiana, for developing a jogging track, tennis court and swimming pool. *Id.* at 187. O'Connor advised the Corps of the activity and inquired whether a permit was required. *Id.* The Corps stated a permit was not required as long as there were no deviations, because fill would not be placed directly in the wetland. *Id.* After discovering fill was deposited into the wetland, the Corps declared a Clean Water Act violation since the fill would impact the water quality of Sagauny Lake and surrounding wetlands. *Id.* at 187. O'Connor requested an after-the-fact permit pursuant to the Corps' Nationwide Permit program. *Id.* at 188. The Corps determined that O'Connor needed an individual permit, based on the potentially adverse affect on the adjacent wetlands and 65 acre lake. *Id.* After the Corps issued public notice and received comments, the Corps assumed that practicable alternatives existed, and denied the individual permit, concluding it was contrary to the public interest. *Id.* Despite significant modifications in his proposal, the Corps concluded that O'Connor failed to address practical alternatives. *Id.* at 189. O'Connor argued that the Corps had acted arbitrarily and capriciously when it denied the permit to fill 41 acres of wetland. *Id.* at 194.

57. *Id.* at 195-96.

would have outweighed the benefits accruing to O'Connor.[58] The court also determined that by failing to address practical alternatives, the Corps may presume that practical alternatives exist.[59]

While the court and the Corps found that practical alternatives were crucial to the determination of whether to grant a permit for the fill of the wetland in *O'Connor*, Congress has ignored the practical alternative analysis in some situations. Congress, through H.R. 961, strikes the alternative analysis for some wetland areas by affording this protection only to certain wetland areas.[60]

The guidelines also indicate that the issue of whether the proposed action is water dependent or non-water dependent is a determining factor in balancing the adverse impacts on the ecosystem.[61] The proposed action is water dependent if it requires access or proximity to, or siting within the aquatic site in question to fulfill its basic purpose.[62] The 404(b)(1) guidelines state that for non-water dependent operations "practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise."[63]

The guidelines further indicate that a permit will not be granted when its issuance violates any applicable state water quality standard, violates any toxic effluent standard, jeopardizes the existence of a endangered or threatened species under the Endangered Species Act of 1973, or violates any requirement to protect any marine sanctuary designated under the Marine Protection, Research, and Sanctuaries Act of 1972.[64] Additionally, the guidelines state that a permit will not be granted which causes or contributes to significant degradation of the waters of the United States.[65] Furthermore, the guidelines consider any adverse impact on human health or welfare, adverse effects on life stages of aquatic and other wildlife, adverse effects on the aquatic ecosystem, or adverse effects on recreational, aesthetic, and economic values to be unacceptable.[66] A denial of a permit is appropriate unless appropriate and practicable steps have been taken which minimize potential adverse impacts.[67]

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58. *Id.*
59. *Id.* at 195.
60. *See infra* part IV.B (discussing the permit process under H.R. 961).
61. 40 C.F.R. § 230.10(a)(3) (1995) (containing the Clean Water Act § 404(b)(1) guidelines).
62. *Id. See supra* note 53 (providing the text of the water dependent definition).
63. *See supra* note 53 (providing the text of the water dependent definition).
64. 40 C.F.R. §§ 230.10(b)(1)-(4) (1995).
65. *Id.* § 230.10(c).
66. *Id.* §§ 230.10(c)(1)-(4).
67. *Id.* § 230.10(d).

## III. COURTS' INTERPRETATION OF CORPS JURISDICTION

### A. UPHOLDING JURISDICTION OVER ADJACENT WETLANDS

The Corps has jurisdiction to grant a permit for the discharge of dredged or fill material into wetland areas.[68] The United States Supreme Court upheld this interpretation of the Clean Water Act, in *United States v. Riverside Bayview Homes, Inc.*[69] In this case, Riverside Bayview Homes placed fill materials on its property, including material in low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan.[70] The Corps, determining the wetlands to be "adjacent wetland" under the 1975 regulation defining "waters of the United States," filed suit to enjoin Riverside from filling the area without the Corps' permission.[71] The trial court determined that the property constitutes a covered wetland and therefore enjoined Riverside from filling it without a permit.[72] The Sixth Circuit construed the regulation to exclude wetlands that were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation.[73]

The Supreme Court granted certiorari to determine the proper interpretation of the Corps' regulation defining "waters of the United States" and to determine the scope of the Corps' jurisdiction under the Clean Water Act.[74] The Court found that saturation by either surface or ground water may bring an area within the category of wetlands, provided that the saturation could support wetland vegetation.[75]

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68. 33 U.S.C. § 1344(a) (1988). This section states that:

> The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

*Id. See also* A.R. Criscuolo & Assoc.'s, Inc., v. New Jersey Dep't of Envtl. Protection, 592 A.2d 313, 318 (N.J. Super. Ct. App. Div. 1991) (providing exemption for development activities authorized by nationwide permit issued by Army Corps of Engineers pursuant to Clean Water Act is valid exercise of regulatory power within scope of enabling legislation).

69. 474 U.S. 121, 138 (1985).

70. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 124 (1985). Riverside was preparing for construction of a housing development. *Id.*

71. *Riverside*, 474 U.S. at 124. The Corps' jurisdiction includes wetlands adjacent to waters. 33 C.F.R. § 328.3 (1995). Regulations define "adjacent wetlands" as "bordering, contiguous, or neighboring including wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." *Id.*

72. *Riverside*, 474 U.S. at 125.

73. *Id.* This was the second appeal of this case; the first appeal considered the effect of the intervening amendment to the regulation. *Id.* The district court again held that the Corps had jurisdiction over the property. *Id.*

74. *Riverside*, 474 U.S. at 126.

75. *Id.* at 129-30. The Court interpreted the definition of wetlands. *See supra* notes 12-16 and

Congress chose to define the waters covered by the Act broadly.[76] In adopting the definition of the term "navigable waters" as "the waters of the United States," Congress sought to repudiate limits of prior federal regulation of water pollution and to regulate at least some waters not deemed navigable.[77] Given the congressional concern for the protection of aquatic ecosystems, the Court required that a reasonable interpretation of "waters" must encompass adjacent wetlands.[78]

The transition between where water ends and land begins is often not easy to define.[79] However, this transition is the determining factor for Corps jurisdiction.[80] Faced with determining the extent of the Corps' regulatory authority, the Court stated, that an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority.[81] The Court concluded "that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act."[82] The Court discussed legislative attempts to modify the Clean Water Act through Amendments in 1977.[83] The Court determined that Congress' rejection of attempts to curb Corps jurisdiction indicated a concern that protection of wetlands would be hampered.[84] The Court stated:

> The significance of Congress' treatment of the Corps § 404 jurisdiction in its consideration of the Clean Water Act of 1977 is twofold. First, the scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of "navigable waters." . . . Second, it is notable that even those who would have restricted the reach of the Corps'

accompanying text (defining wetlands).

76. *Riverside*, 474 U.S. at 132. The Court noted that section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, constituting a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* (citing 33 U.S.C. § 1251). The Court found that Congress recognized that the protection of aquatic ecosystems demanded broad federal authority to control pollution because of water's movement and the need to control discharges at their source. *Id.* at 132-33.

77. *Id.* at 133.

78. *Id.*

79. *Id.* at 132.

80. *See* discussion *infra* part IV.B. H.R. 961 attempts to correct this jurisdictional problem by classifying wetlands into three different categories. H.R. 961, 104th Cong., 1st Sess. (1995). The different categories of wetlands receive different amount of protection in the permit requirement process. *Id.*

81. *Riverside*, 474 U.S. at 132.

82. *Id.* at 135.

83. *Id.*

84. *Id.*

> jurisdiction would have done so not by removing wetlands altogether from the definition of "waters of the United States," but only by restricting the scope of "navigable waters" under § 404 to waters navigable in fact and their adjacent wetlands.[85]

Thus, the Supreme Court upheld the jurisdiction of the Corps over the adjacent wetlands in *Riverside*.[86] Courts have also concluded that the Commerce Clause and the use by migratory birds of the wetland areas requires Corps' jurisdiction over these isolated wetlands.

### B. THE USE OF THE COMMERCE CLAUSE TO UPHOLD AGENCY JURISDICTION OVER WETLANDS

The federal government's powers to regulate commerce also gives the Corps jurisdiction to regulate the dredging and filling of wetlands, including isolated wetlands.[87] Specifically, regulation of isolated waters and their adjacent wetlands may occur if the degradation or destruction affects interstate or foreign commerce.[88] The Corps has determined that certain areas are within its jurisdiction by including wetland areas as within the "waters of the United States" when activities in those areas effect interstate commerce.[89] The wetland areas falling within this interpretation of the Corps' jurisdiction include: (1) those which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) those from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) those which are used or could be used for industrial purposes by industries in interstate commerce.[90]

Wetland areas that may be used by migratory birds may also be deemed to affect interstate commerce and therefore fall within the jurisdiction of the Corps.[91] Jurisdiction under the migratory bird rule is based on the assumption that birds migrating and thus crossing state

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85. *Id.* at 137 (emphasis omitted).

86. *Riverside*, 474 U.S. at 139.

87. *See* Hoffman Homes, Inc. v. United States Envtl. Protection Agency, 999 F.2d 256 (7th Cir. 1993) (finding agency regulation of wetlands and other bodies of water, whose use, degradation or destruction "could affect interstate commerce," covered waters whose connection to interstate commerce was potential rather than actual, or minimal rather than substantial).

88. 33 C.F.R. § 328.3(a)(3) (1995).

89. 33 C.F.R. § 328.3 (1995). *See generally* Dennis J. Priolo, *Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction Over Isolated Wetlands*, 30 LAND & WATER L. REV. 91 (1995) (discussing Corps' jurisdiction over private landowners' isolated wetlands).

90. 33 C.F.R. § 328.3(3)(i)-(iii) (1995).

91. *See* Lawrence R. Liebesman, *Section 404 Dredging and Fill Material Discharge Permit Program, in* THE CLEAN WATER HANDBOOK 136, 143-44 (Parthenia B. Evans, ed. 1994) (discussing the migratory bird rule).

lines, will be the subject of bird watching, hunting and other recreational uses.[92] The effect of the destruction or degradation of their wetland habitat will destroy or hinder these activities.[93]

The Ninth Circuit in *Leslie Salt Co. v. United States*,[94] determined that the commerce power and the Clean Water Act were broad enough to extend jurisdiction to local waters which may provide habitat to migratory birds and endangered species.[95] The court arrived at this conclusion after examining evidence that isolated wetlands were used by migratory birds during flooding of the area.[96] The court arrived at this conclusion because the Clean Water Act includes a policy of protecting wildlife and therefore, migratory birds create the connection between a wetland and interstate commerce.[97]

Likewise, the Seventh Circuit in *Hoffman Homes v. Administrator, United States Environmental Protection Agency*,[98] discussed the migratory bird and isolated wetland issues.[99] The Corps imposed a fine when it determined that Hoffman had violated the Clean Water Act.[100] The violation occurred when Hoffman filled and graded parts of 43 acres of wetlands in preparation for a housing development.[101] The area in question consisted of two parcels.[102] Area A consisted of approximately one acre, not connected to any body of water, but was the source of collected rain water and snow melt and it frequently ponded or saturated during wet weather.[103] Area B consisted of approximately 13.3 acres and was a part of a 50-acre wetland adjacent to the Poplar Creek.[104]

Area A was an isolated wetland and thereby raised the issue of whether the Corps had jurisdiction over isolated wetlands.[105] Since the Supreme Court had not previously ruled on whether the Corps has jurisdiction over "isolated wetlands," the court based its decision on interpretations of the EPA.[106] Specifically, the Seventh Circuit

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92. *Id.*
93. *Id.*
94. 896 F.2d 354 (9th Cir. 1990).
95. Leslie Salt Co. v. United States, 896 F.2d 354, 360 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991), *aff'd in part*, 55 F.3d 1388 (9th Cir. 1995), *cert. denied sub nom.* Cargill, Inc. v. United States, 116 S. Ct 407 (1995) (Thomas, J., dissenting).
96. *Leslie Salt*, 896 F.2d at 356.
97. *Id.* at 359-60.
98. 999 F.2d 256 (7th Cir. 1993).
99. Hoffman Homes, Inc. v. United States Envtl. Protection Agency, 999 F.2d 256 (7th Cir. 1993).
100. *Id.* at 258.
101. *Id.* at 257-58.
102. *Id.* at 258.
103. *Id.*
104. *Hoffman*, 999 F.2d at 258.
105. *Id.* at 259-60.
106. *See supra* note 82 and accompanying text (referring to the United States Supreme Court's

determined that the EPA properly interpreted 40 C.F.R. § 230.3(s)(3) which defines the term "waters of the United States."[107] The interpretation was based on the inclusion in the term "waters of the United States," wetland areas which interstate travelers could use to take and sell fish in interstate commerce, or for industrial purposes in interstate commerce. Use of the word "could" indicates that the regulation covers waters whose connection to interstate commerce may be potential, rather than actual or minimal, rather than substantial.[108] The court also determined that migratory birds could serve as the requisite connection between a wetland and interstate commerce.[109]

The Seventh Circuit, in *Rueth v. United States Environmental Protection Agency*,[110] again discussed the connection between migratory birds and the Commerce Clause.[111] In this case, Rueth, a real estate developer, filled approximately three acres of wetlands without obtaining a permit.[112] The EPA, having concurrent jurisdiction with the Corps in the enforcement of the Clean Water Act, ordered that Rueth cease filling the wetlands and restore the filled areas.[113] Rueth sought after-the-fact approval under a nationwide permit.[114] The Corps denied the approval unless ten acres or less would be affected by the development.[115] Rueth then sought injunctive relief against the EPA's exercise of jurisdiction.[116] The court upheld the trial court's dismissal on the grounds that the EPA had not issued a final appealable decision.[117] Once the EPA determines that the Clean Water Act covers a wetland and seeks enforcement of penalties, the determination is then open to

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ruling that the wetlands are within the Corps' jurisdiction). *See* 33 C.F.R. § 330.2 (1995) (defining isolated waters as those non-tidal waters of the United States that are not part of a surface tributary system to interstate or navigable of the United States and not adjacent to such tributary waterbodies). *But see* United States v. Sargent County Water Resource Dist., 876 F. Supp. 1081, 1087 (D.N.D. 1992) (determining that CWA jurisdiction exists over isolated wetlands, both because of their importance to migratory waterfowl and because of their potential use by interstate travelers for recreational purposes). *See generally* Elizabeth Ann Glass Geltman, *Regulation of Non-Adjacent Wetlands Under Section 404 of the Clean Water Act*, 23 NEW ENG. L. REV. 615 (1987-88) (discussing jurisdiction over isolated wetlands).

107. *Hoffman*, 999 F.2d at 260-61.

108. *Id.*

109. *Id.*

110. 13 F.3d 227 (7th Cir. 1993).

111. Rueth v. United States Envtl. Protection Agency, 13 F.3d 227, 231 (7th Cir. 1993).

112. *Id.* at 228.

113. *Id.*

114. *Id.* A nationwide permit is issued for activities in wetland areas that have minimal impact on the wetland area of the discharge. 33 C.F.R. § 330.1(b) (1995).

115. *Rueth*, 13 F.3d at 228 (noting that the Corps would reconsider its decision if the development affected ten acres or less).

116. *Id.*

117. *Id.* at 230.

challenge in court.[118] The court also upheld its decision in *Hoffman Homes* that one of the tests for whether the wetland affects interstate commerce is whether migratory birds use the wetland.[119] Past decisions of the court recognized Congress' intent to have the Clean Water Act reach as far as the Commerce Clause allows.[120] The *Rueth* decision further illustrates courts' willingness to extend the Clean Water Act to include wetlands not specifically mentioned in the Act.

Although not specifically defined within the Clean Water Act, wetland protection is among the most important considerations of the Clean Water Act if the ultimate goals of the Act are to be accomplished and maintained. H.R. 961 imposes rigid definitions upon the wetlands of this country and thereby reduces the protection enjoyed by wetland areas. H.R. 961 negates over twenty years of Corps interpretation of the Clean Water Act and the courts' recognition of their power to regulate and protect wetland areas. For these reasons, it is imperative that H.R. 961 does not become law.

## IV. COMPREHENSIVE WETLANDS CONSERVATION AND MANAGEMENT ACT OF 1995

In 1995, Congress drafted and passed H.R. 961, including the Comprehensive Wetlands Conservation and Management Act of 1995.[121] The purpose of this legislation was to establish a new federal regulatory program for certain wetlands and waters of the United States.[122]

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118. *Id.*
119. *Id.* at 231.
120. *Rueth*, 13 F.3d at 231.
121. H.R. 961, 104th Cong., 1st Sess. (1995).
122. *Id.* § 801(b). Congress further categorized the purposes:

> (1) to assert federal regulatory jurisdiction over a broad category of specifically identified activities that result in the degradation or loss of wetlands;
> (2) to provide that each federal agency, officer, and employee exercise federal authority under section 404 of the Federal Water Pollution Control Act to ensure that agency action under such section will not limit the use of privately owned property so as to diminish its value;
> (3) to account for variations in wetlands functions in determining the character and extent of regulation of activities occurring in wetlands areas;
> (4) to provide sufficient regulatory incentives for conservation, restoration, or enhancement activities;
> (5) to encourage conservation of resources on a watershed basis to the fullest extent practicable;
> (6) to protect public safety and balance public and private interests in determining the conditions under which activity in wetlands areas may occur; and
> (7) to streamline the regulatory mechanisms relating to navigational dredging in the Nation's waters.

*Id.*

Although there are numerous sections to H.R. 961, this Note focuses on the Comprehensive Wetlands Conservation and Management Act of 1995.. This bill illustrates Congress' desire to streamline the permit process and make it less burdensome for parties to obtain a permit for the dredging and filling of wetlands.[123]

### A. THE CLASSIFICATION SYSTEM

H.R. 961 attempts to segregate wetlands into one of three categories to differentiate between the permit process for different types of wetlands.[124] These categories are identified as Type A, Type B, and Type C wetlands.[125] Specifically, Type A wetlands are what Congress designates as most deserving of protection.[126] Type B wetlands are those providing wildlife habitat or some significant wetland functions and Type C wetlands are of marginal significance, but numerous or serve

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123. *See generally* H.R. 961 § 801 (providing the text of the Comprehensive Wetlands Conservation and Management Act of 1995).

124. *Id* § 803(c)(3).

125. *Id.* The three wetlands classifications are described as:

> Type A wetlands are those wetlands that are of critical significance to the long-term conservation or the aquatic environment of which such wetlands are a part and which meet the following requirements:
>
> (i) such wetlands serve critical wetlands functions, including the provision of critical habitat for a concentration of avian, aquatic, or wetland dependent wildlife;
>
> (ii) such wetlands consist of or may be a portion of ten or more contiguous acres and have an inlet or outlet for relief of water flow; except that this requirement shall not operate to preclude the classification as Type A wetlands lands containing prairie pothole features, playa lakes, or vernal pools if such lands otherwise meet the requirements for Type A classification under this paragraph;
>
> (iii) there exists a scarcity within the watershed or aquatic environment of identified functions served by such wetlands such that the use of such wetlands for an activity in wetlands or waters of the United States would seriously jeopardize the availability or these identified wetlands functions; and
>
> (iv) there is unlikely to be an overriding public interest in the use of such wetlands for purposes other than conservation;
>
> Type B wetlands are those wetlands that provide habitat for a significant population of wetland dependent wildlife or provide other significant wetlands functions, including significant enhancement or protection of water quality or significant natural flood control; and
>
> Type C wetlands are all wetlands that:
>
> (i) serve limited wetlands functions;
>
> (ii) serve marginal wetlands functions but which exist in such abundance that regulation of activities in such wetlands is not necessary for conserving important wetlands functions;
>
> (iii) are prior converted cropland;
>
> (iv) are fastlands; or
>
> (v) are wetlands within industrial, commercial, or residential complexes or other intensely developed areas that do not serve significant wetlands functions as a result of such location.

*Id.*

126. *Id.* § 803(e).

limited wetland functions.[127] The amount of wetlands in each of these categories is subject to certain restraints.[128] For example, H.R. 961 limits the amount of Type A wetlands designated for protection in any given county.[129] By classifying wetlands, Congress sought to assign a value to wetland areas without the benefit of expert opinion.[130] To assign value to an area, Congress considered the importance of the wetland area to habitat and the aquatic environment.[131] This relationship is balanced with the public interest in the use of the wetland area.[132] The classification of the wetland area is important because of the different permit processes for each classification.

### B. THE PERMIT PROCESS UNDER H.R. 961

#### 1. *Type A Wetlands*

Type A wetlands receive the greatest amount of protection.[133] The agency uses "sequential analysis" to avoid adverse impacts on the wetland, minimize the adverse impacts that cannot be avoided, and compensate for wetland functions that cannot be avoided or minimized.[134] The Secretary mandates mitigation if he or she finds it necessary to prevent the unacceptable loss or degradation of Type A wetlands.[135]

H.R. 961 sets out mitigation measures in the permit process for Type A and Type B wetlands.[136] Mitigation required under H.R. 961 for activities in Type A and B wetlands includes: minimization-of-impacts considerations in the project design; donation of Type A or B wetlands as mitigation for alteration or degradation of

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127. *Id.*

128. H.R. 961 § 803(g).

129. *Id.* § 803(g)(2). This section provides:

> No more than 20 percent of any county, parish, or borough shall be classified as Type A wetlands. Type A wetlands in federal or state ownership (including Type A wetlands in units of the National Wildlife Refuge System, The National Park System, and lands held in conservation easements) shall be included in calculating the percent of Type A wetlands in a county, parish, or borough.

*Id.*

130. *See generally* Emily Goodman, *Defining Wetlands for Regulatory Purposes: A Case Study in the Role of Science in Policymaking*, 2 BUFF. ENVTL. L.J. 135 (1994) (discussing attempts to define wetlands).

131. H.R. 961 § 803(c)(3)(A)(iii)-(B).

132. *Id.* § 803(c)(3)(iv).

133. *Id.* § 803(e)(2)(A). This section provides that "[t]he Secretary shall determine whether to issue a permit for an activity in waters of the United States Classified under subsection (c) as Type A wetlands based on a sequential analysis." *Id.*

134. *Id.*

135. *Id.* § 803(e)(2) (B).

136. H.R. 961 § 803(e)(3)(D).

wetlands; and creation of wetlands to compensate for wetland degradation.[137] These mitigation measures are similar to those specified in the Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines [hereinafter MOA].[138] However, H.R. 961 also defines instances when there is no requirement for mitigation.[139] Mitigation is not required when the Secretary finds that the adverse impact of an activity is limited, the failure to impose mitigation is compatible with maintaining wetland functions, no practical means of mitigation are available, there is an abundance of similar wetlands' functions in the area continuing to serve the functions the activity will destroy, the nature of the impact is temporary, or a waiver is necessary to prevent special hardship.[140]

In the past, mitigation and compensatory mitigation protected valued wetland areas by minimizing the adverse effects caused by widespread permit activities. However, there are no mitigation requirements of mitigation measures when a significant amount of wetlands exist in the area.[141] Congress did not specify the amount of wetlands that equaled "a significant amount of wetlands."[142] This policy can be likened to the cap placed on the amount of Type A wetlands available in a given area because Congress has again

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137. *Id.* § 803(e)(3)(D)(i), (ii), (iv). Also considered to be mitigation measures:

> (v) compensation through contribution to a mitigation bank program established pursuant to paragraph (4);
> (vi) offsite compensatory mitigation if such mitigation contributes to the restoration, enhancement or creation of significant wetlands functions on a watershed basis and is balanced with the effects that the proposed activity will have on the specific site; except that offsite compensatory mitigation, if any, shall be required only within the State within which the proposed activity is to occur, and shall, to the extent practicable, be within the watershed within which the proposed activity is to occur, unless otherwise consistent with a State wetlands management plan;
> (vii) contribution of in-kind value acceptable to the Secretary and otherwise authorized by law;
> (viii) in areas subject to wetlands loss, the construction of coastal protection and enhancement projects;
> (ix) contribution of resources of more than one permittee toward a single mitigation project; and
> (x) other mitigation measures, including contributions of other than in-kind value referred to in clause (vii), determined by the Secretary to be appropriate in the public interest and consistent with the requirements and purposes of this Act.

*Id.* § 803(e)(3)(D)(v)-(x).

138. *Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1)*, 20 ENVTL. L. REP. (EPA) 35,223 (February 6, 1990) [hereinafter *MOA*].

139. H.R. 961 § 803(e)(3)(E).

140. *Id.*

141. *Id.*

142. *Id.*

determined that only a limited amount of wetland areas are worthy of protection.[143] Even though Congress has determined that Type A and certain Type B wetlands are significant, the value of these wetlands diminish when a determination is made that there are other similar wetlands in the area.[144] It appears inconsistent with the protection of significant wetland areas to limit the amount of wetland areas that fall within the extended protection as set out by H.R. 961.[145]

Mitigation measures are also satisfied when the secretary finds the activities in Type A wetlands are carried out in accordance with state approved reclamation plans or revegetation plans following mining and when the activity achieves overall environmental benefits.[146] Additionally, mitigation required by the secretary is carried out in accordance with that required for Type B wetlands.[147]

### 2. *Type B Wetlands*

Activities undertaken in Type B wetlands also require a permit for the dredging and filling of areas under H.R. 961.[148] Although a permit is required in Type B wetlands, the requirements for permitting an activity in Type B wetlands are less stringent.[149] The issuing authority is bound by the purpose stated on the application, whether the specified project purpose is the actual project purpose is irrelevant in the application process.[150] The issuing authority, in determining whether to issue a permit, considers the following: a) the quality and quantity of the wetland area affected by the activity;[151] b) the opportunities to reduce impacts through the minimization of the area affected;[152] c) the costs of mitigation in light of the economic and social benefits of the proposed activity;[153] d) the ability to re-create the wetland functions and the impact on the surrounding watershed[154] and; e) whether the impact on

143. *See supra* note 129 and accompanying text (discussing the cap put on Type A wetlands).

144. H.R. 961 § 803(e)(3)(E).

145. *Id.*

146. *Id.*

147. *See infra* notes 157-162 and accompanying text (discussing mitigation measures for Type B wetlands).

148. H.R. 961 § 803(e)(3).

149. *Id.* § 803(e)(3)(A). This section states that "the Secretary may issue a permit authorizing activities in Type B wetlands if the Secretary finds that issuance of the permit is in the public interest, balancing the reasonably foreseeable benefits and detriments resulting from the issuance of the permit." *Id.*

150. *Id.* § 803(e)(3)(B). This section provides that "in considering an application for activities on Type B wetlands, there shall be a rebuttable presumption that the project purpose as defined by the applicant shall be binding upon the Secretary." *Id.*

151. *Id.* § 803(e)(3)(A)(i).

152. *Id.* § 803(e)(3)(A)(ii).

153. H.R. 961 § 803(e)(3)(A)(iii).

154. *Id.* § 803(e)(3)(A)(v), (vi).

the wetland is temporary or permanent.[155] These factors convey that the wetlands in question are replaceable, or are at least less significant than the public's interest in the undertaking of the activity being promoted.

By applying the list set out in H.R. 961, the issuing authority will be influenced to permit the activity in the promotion of the public's best interest because of the overwhelming weight of factors that favor permitting the activity. The ability to mitigate the damage or measure the value of the wetland by the use of certain migratory birds or wildlife may be immaterial when measured against a rich mineral or oil deposit, or other factors that in the short term may be deemed as in the public's best interest.[156]

Mitigation is an important aspect in the analysis of permitting under H.R. 961.[157] Congress determined that when an impact upon wetlands is unavoidable, the person requesting the permit should mitigate the loss of wetlands.[158] As with many other aspects of wetland issues, the courts and others have dealt with and discussed the issue of mitigation.[159] In 1990, the Corps and the EPA introduced the MOA.[160] One of the goals of the MOA was to maintain no overall net loss of this country's remaining wetlands as set out in the 404(b)(1) guidelines.[161] The no overall net loss of the remaining wetlands refers to a goal of one for one functional replacement of lost wetlands.[162] The factors that the MOA attempts to use to accomplish the goal of no overall net loss include an evaluation of mitigation to avoid, to the maximum extent possible, wetland losses, minimize impacts, and compensate through mitigation unavoidable wetland losses.[163] The goal of "no net loss" of the remaining wetlands, in the MOA, assured that protection of wetlands would continue by ensuring that permits would not be granted for the dredging or filling of wetlands without a determination that impacts are minimized, avoided, or

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155. *Id.* § 803(e)(3)(A)(vii).

156. *See Id.* § 803(e)(3)(A)(i)-(iv).

157. *Id.* § 803(C).

158. H.R. 961 § 803 ©.

159. *See* Plantation Landing Resort, Inc. v. United States, 30 Cl. Ct. 63, 69 (Cl. Ct. 1993) (finding denial of permit was premised on failure to reach agreement on mitigation requirements to offset wetland losses); *See generally* Debra L. Donahue, *Taking a Hard Look at Mitigation: The Case for the Northwest Indian Rule*, 59 U. COLO. L. REV. 687 (1988) (discussing the effects of cases in the development of mitigation policies); Carol E. Dinkins, *Regulatory Obstacles To Development and Redevelopment in the U.S.: Wetlands and Other Essential Issues*, C945 A.L.I. A.B.A. 491, 508 (1994) (discussing mitigation policies); Liebesman, *supra* note 91, at 143-44 (discussing mitigation policy and banking).

160. *See MOA, supra* note 138, at 35,223.

161. *Id.*

162. *Id.*

163. *Id. See also* Mark A. Chertok, *Federal Regulation of Wetlands*, C921 A.L.I. A.B.A. 1311, 1138 (1994) (discussing the factors used in the *MOA* to accomplish the goal of no overall net loss).

the wetland area is replaced.[164] Clearly, the protection afforded wetland areas in the past is reduced by H.R. 961 for Type A and Type B wetlands.[165]

### 3. *Type C Wetlands*

Activities in wetlands which the secretary classifies as Type C wetlands can be undertaken without any required authorization.[166] Congress defined Type C wetlands as those that serve limited wetlands' functions, serve marginal functions but are in such abundance that regulation is unnecessary, are prior converted cropland,[167] are fastlands,[168] or exist in industrial, commercial, or residential complexes or other developed areas.[169] It appears from H.R. 961 that Congress has determined that Type C wetlands are relatively insignificant and that filling or other activities in these areas are without consequence.[170] In the past, the Corps has determined that certain wetlands, classified as Type C wetlands under H.R. 961, were subject to protection even when the wetland would appear to serve limited wetland functions.

The Ninth Circuit in *Leslie Salt Co. v. United States*,[171] dealt with the issue of a government created wetland area in old calcium chloride pits.[172] The prior owners of the land were salt manufacturers and turned pasture land into pits for the depositing of calcium chloride.[173] The calcium chloride created large, shallow, water tight basins.[174] In 1959,

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164. *MOA, supra* note 138, at 35,223.

165. *See* H.R. 961, 104th Cong., 1st Sess. § 803(e)(2), (3) (1995).

166. *Id.*

167. 136 CONG. REC. H10616-02, H10622 (Oct. 19, 1990).

> Prior converted cropland' is defined . . . as wetlands which were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before 23 December 1985, to the extent that they no longer exhibit important wetland values. Specifically, prior converted cropland is inundated with water for no more than 14 consecutive days during the growing season. Prior converted cropland generally does not include pothole or playa wetlands. In addition, wetlands that are seasonally flooded or ponded for 15 or more consecutive days during the growing season are not considered prior converted cropland.

*Id.*

168. 140 CONG. REC. S13853-01, S13871 (Sept. 30, 1994). "The term 'fastlands' means lands located behind permitted manmade structures, such as lands located behind a levee to permit utilization of the lands for commercial, industrial, or residential purposes consistent with each local land use planning requirement." *Id.*

169. H.R. 961 § 803(c)(3)(C).

170. *See supra* note 166 and accompanying text (determining that activities in Type C wetland areas can be undertaken without a permit).

171. 896 F.2d 354 (9th Cir. 1990).

172. Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990), *cert. denied,* 498 U.S. 1126 (1991), *aff'd in part,* 55 F.3d 1388 (9th Cir. 1995), *cert. denied sub nom.*, Cargill, Inc. v. United States, 116 S. Ct. 407 (1995) (Thomas, J., dissenting).

173. *Id.* at 355.

174. *Id.*

salt production ceased but the pits remained.[175] Due to rainfall and development around the area, including plowing of the property by Leslie to curb dust problems, natural ecological developments resulted in the creation of wetland features near the edge of the Leslie property.[176] Migratory birds used the pits during the winter and spring flooding of the property.[177] In order to drain the property, Leslie dug drainage ditches.[178] The Corps responded by issuing a cease and desist order which claimed that Leslie was violating the Clean Water Act by discharging fill into the waters of the United States without a permit.[179] The court identified the two issues in this case as: (1) whether Congress intended for the Clean Water Act to extend to property made aquatic in part through actions of the government;[180] and (2) whether the Corps' regulations interpreting the Act provided for the Corps' jurisdiction over the area.[181]

The court further determined that the identity of the party responsible for flooding the land was irrelevant.[182] Additionally, the method in which the lands became wetlands was not the determining factor of the Corps' jurisdiction.[183] Jurisdiction was determined by whether the site was presently considered a wetland area and not how it came to be a wetland site.[184] The court stated that the proper response to the Corps' actions was to seek damages through inverse condemnation proceedings and not to restrict the jurisdiction of the Corps.[185]

The wetland area at issue in *Leslie Salt* is similar to what Congress has classified as Type C wetlands. The court determined that migratory birds and endangered species may use the property as habitat.[186] The Commerce Clause and the Clean Water Act are therefore broad enough that the Corps' jurisdiction may be extended to these waters.[187] It is reasonable to conclude that these species may also use wetland areas

175. *Id.*
176. *Id.* at 356.
177. *Leslie Salt*, 896 F.2d at 356.
178. *Id.* at 355-56.
179. *Id.*
180. *Id.* at 356-57. The state highway authority breached a levy on the wildlife refuge adjacent to the property and destroyed a tidegate which had prevented the tidal backflow from reaching Leslie's property. *Id.* at 356.
181. *Id.* at 357.
182. *Leslie Salt*, 896 F.2d at 358.
183. *Id.* *See also* Bailey v. United States, 647 F. Supp. 44, 48 (D. Idaho 1986) (citing United States v. Ciampitti, 583 F. Supp. 483 (D.N.J. 1984) as authority for finding Army Corps of Engineers has jurisdiction over wetlands even though wetlands may have been artificially created through construction of a dam).
184. *Leslie Salt*, 896 F.2d at 358.
185. *Id.* (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128 (1985)).
186. *Id.* at 360.
187. *Id.*

classified as Type C wetlands as habitat and, as in the past, raise Commerce Clause considerations. The case was remanded to the District Court, which entered judgment against the property owner who then appealed to the Ninth Circuit.[188] Upholding the District Court's findings that the jurisdiction of the Corps reached the waters in question, the court stated the Clean Water Act's policy of protecting wildlife could plausibly extend jurisdiction to isolated waters used only by migratory birds, even though, there is no suggestion of this conclusion within the Act.[189] The court found that it is reasonable to conclude that migratory birds can act as the connection between a wetland and interstate commerce.[190]

In *Leslie Salt*, the wetlands in question were waters created by a third party which migratory birds and endangered species used as habitat.[191] This type of wetland could easily be defined as Type C wetlands under H.R. 961. Unfortunately, by creating H.R. 961, Congress has determined that Type C wetland areas are unworthy of protection. In *Leslie Salt*, the Ninth Circuit determined that this type of wetland was subject to the jurisdiction of the Corps.[192] These and other similar wetland areas under H.R. 961 will no longer be protected to the same degree as they have been in the past.

### C. OTHER WETLAND AREAS THAT ARE NOT SUBJECT TO THE PERMIT PROCESS UNDER H.R. 961

Other wetlands areas are not subject to the permit process under H.R. 961.[193] For example, an activity in wetlands or waters of the United States may be undertaken without a permit from the Secretary if that activity is authorized under a general permit for activities determined to not result in a significant loss of wetland functions or values.[194] General permits apply to activities similar in nature, and those activities, when performed separately and cumulatively, will not result in the significant loss of ecologically significant wetlands' values and functions.[195] These general permits may be issued on a state, regional, or nationwide basis

188. Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995) [hereinafter Leslie Salt II].

189. *Id.* at 1394-95. *See also supra* note 91-92 (discussing the link between migratory birds and interstate commerce).

190. *Leslie Salt II*, 55 F.3d 1395-96. *See also* Hughes v. Oklahoma, 441 U.S. 322, 336-37 (1979) (finding that a prohibition against the transportation of minnows out of the state is a violation of the Commerce Clause). A significant effect on the activities of wildlife can be linked to the Commerce Clause. *Id.* at 336-37.

191. Leslie Salt Co. v. United States, 896 F.2d 354, 360 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991), *aff'd in part*, 55 F.3d 1388 (9th Cir. 1995), *cert. denied sub nom.*, Cargill, Inc. v. United States, 116 S. Ct. 407 (1995) (Thomas, J., dissenting).

192. *Id.*

193. H.R. 961, 104th Cong., 1st Sess. § 803(b)(2) (1995).

194. *Id.*

195. *Id.* § 803(e)(8).

for a number of activities.[196] The important aspect of this provision is the determination by the Secretary of when an activity will not result in "significant loss of ecologically significant wetlands' values and functions."[197] The Secretary makes the determination after considering the amount of conserved wetlands already within a state.[198] As in other areas of H.R. 961, Congress may make a determination to issue permits without considering the effects on a particular wetland area. Each wetland area has its own characteristics and performs its own functions. Determinations made generally regarding activities under this general permit system may cause different amounts of damage to different wetland areas.

H.R. 961 also sets out activities in wetlands or waters of the United States which are exempt from the permit requirements altogether.[199] This list includes eighteen categories of exempt activities.[200] The list of exempt activities exists because Congress determined that these activities are more important than the protection of wetlands.[201] These exemptions endanger the continued existence of wetlands in these areas.

H.R. 961 also allows for wetlands located on agricultural lands and associated nonagricultural lands to be delineated by the Secretary of Agriculture[202] under the Food Security Act of 1985.[203] Lands exempt from requirements of subtitle C of Title XII of the Food Security Act are also exempt from permitting requirements in H.R. 961.[204] Therefore, by finding ways to conduct farming activities in wetland areas, individuals in

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196. *Id.*
197. *Id.*
198. H.R. 961 § 803(e)(8)(E).
199. *Id.* § 803(f).
200. *Id.* The following is a list of the permit-exempt activities: § 803(f)(1)(A) (farming and other agricultural activities); § 803(f)(1)(B) (maintenance of dams and other water control devises); § 803(f)(1)(C) (ranching); § 803(f)(1)(D) (construction of sedimentary basins); § 803(f)(1)(E) (maintenance of farm, forest roads and utility roads); § 803(f)(1)(F) (activities undertaken on farmed wetlands); § 803(f)(1)(G) (activities for which a state has an approved plan); § 803(f)(1)(H) (activities consistent with a land management plan approved by the secretary); § 803(f)(1)(I) (marsh management); § 803(f)(1)(J) (activities within a coastal zone); § 803(f)(1)(K) (activities undertaken in incidentally created wetlands); § 803(f)(1)(L) (activities for preserving and enhancing aviation safety); § 803(f)(1)(M) (activities as a result of aggregate or clay mining); § 803(f)(1)(N),(O) (placement of a structural member for a pile-supported structure including pilings for a linear project or a pier boathouse); § 803(f)(1)(P) (clearing of vegetation in a right of way of a power line structure); § 803(f)(1)(Q) (activities in water filled depressions incidental to construction activities); § 803(f)(1)(R) (activities undertaken by a State with substantially conserved wetlands for activities such as providing for the infrastructure, log transfer facilities and ice roads and snow disposal). *See also* Joseph G. Theis, *Wetlands Loss and Agriculture: The Failed Federal Regulation of Farming Activities Under Section 404 of the Clean Water Act*, 9 PACE ENVTL. L. REV. 1 (1991) (discussing agricultural effects on wetland issues).
201. H.R. 961 § 803(f).
202. *Id.* § 803(F)(3)(A).
203. 16 U.S.C. § 3822 (Supp. 1995).
204. H.R. 961 § 803(f)(3)(B).

the agricultural field can exempt their activity from the permit regulation.

### D. COMPENSATION PAID TO LANDOWNERS WHEN AGENCY ACTION DIMINISHES THE VALUE OF THE PROPERTY

Upon the denial of a permit for activities in wetland areas, agencies such as the Corps can anticipate when the agency's actions constitute a taking. One author has concluded that "[b]ecause natural resources regulation is an accepted and firmly entrenched aspect of state and federal regulatory systems, most permit denials are unlikely to constitute takings."[205] Clearly, if signed by the President, the present Congressional effort invalidates this statement because H.R. 961 statutorily seeks to set compensation lines for denied permits.[206] H.R. 961 defines when a landowner will be compensated for the loss of use due to the actions of the government.[207] H.R. 961 compensates a landowner for the diminution in value if the loss is greater than twenty percent where the compensation amount equals the diminution in value as a result of the agency action.[208] If the diminution in value is more than fifty percent, at the owner's option, the federal government shall buy the property at its fair market value.[209] Previously, courts have allowed for compensation to be paid to the land owner only when a denial of all viable use of the property occurs.[210]

The regulatory taking threat has a direct effect on the actions of decision makers, such as the Corps, in the granting or denial of permits. Prior to H.R. 961, the determination of when compensation would be forthcoming from the government due to governmental action was based on judicially developed guidelines.[211] These judicially developed guidelines considered whether a reasonable expectation of a property right exists and whether the government action deprives the claimant of

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205. Danielson & Nordell, *supra* note 46, at 357.

206. H.R. 961 § 803(d)(1).

207. *Id.*

208. *Id.*

209. *Id.*

210. *See* Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir 1994 ) (finding removal of all use of property indicates a fully compensable "categorical taking" of the property.); Dufau v. United States, 22 Cl. Ct. 156, 162 (Cl. Ct. 1990), *aff'd*, 940 F.2d 677 (Fed.Cir. 1991) (finding that landowners claiming a temporary taking of their land had to prove that substantially all economically viable use of their property was lost by denying their permit to fill wetlands); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 159-61 (Cl. Ct. 1990), *aff'd*, 28 F.3d 1171 (Fed.Cir. 1994) (finding that a regulatory taking occurred when the value of a landowners' property decreased by over 99% after the Army Corps of Engineers denied a permit to fill 11.5 acres of wetlands).

211. *See generally* Stephen R. Kelly, Note, *The Erosion of the Clean Water Act Through Inverse Condemnation: Can Wetlands Withstand the Takings Clause of the Fifth Amendment?*, 5 B.Y.U. J. PUB. L. 235 (1991) (discussing regulatory takings in wetland cases).

virtually all economically viable use of the property.[212] In *Lucas v. South Carolina Coastal Council*,[213] the United States Supreme Court determined that when the government deprives a landowner of all economically viable use of his or her property, a taking has occurred, even when the state acts to protect the health and safety of residents.[214]

The Court described two categories of regulatory action requiring compensation without inquiry into the public interest advanced by the government action.[215] First, when the regulations compel the property owner to suffer a physical invasion of his property.[216] Second, as discussed above, where the regulation denies all economically beneficial or productive use of the property.[217] The Court determined that the state supreme court's denial of compensation was invalid.[218] The holding in *Lucas* and other court decisions indicate a judicially developed determination of when the Constitution requires compensation to be paid due to governmental actions affecting private property.

The United States Claims Court articulated the two inquiries necessary to make the determination of whether there has been a regulatory taking as a result of government action.[219] The first inquiry considers whether the Agency actions cause a denial of all economically viable use of the property.[220] The second inquiry centers on the extent to which the permit denial interferes with distinct, reasonable, investment-backed expectations.[221]

Congress should leave the determination to compensate landowners to the judiciary. Due to this country's $4 trillion national deficit,[222] the government will likely base its decisions on the lack of funds available and therefore, an inability to purchase the property in question or pay

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212. *See generally* Bhavani Prasad V. Nerikar, Comment, *This Wetland is Your Land, This Wetland is My Land: Section 404 of the Clean Water Act and Its Impact on the Private Development of Wetlands*, 4 ADMIN. L.J. 197 (1990) (discussing the requirements in order to find that a compensable taking has occurred).

213. 112 S. Ct. 2886 (1992).

214. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992). With the intent of building single family homes, Lucas purchased two residential lots on a South Carolina barrier island. *Id.* at 2889. In 1988, the state legislature enacted the Beachfront Management Act, barring Lucas from developing any permanent residence on the property. *Id.* Lucas filed suit claiming that the Act deprived him of all economic viable use of his property, constituting a taking under the Fifth and Fourteenth Amendments requiring compensation. *Id.* at 2889-90.

215. *Id.* at 2893.

216. *Id.*

217. *Id.*

218. *Id.* at 2901-02. Compensation was not required in *Lucas* because the Act furthered the public interest of preserving the beachfront. *Id.*

219. Ciampitti v. United States, 22 Cl. Ct. 310, 318 (Cl. Ct. 1991).

220. *Id.*

221. *Id.*

222. Nancy Mathis, *House Does Its Balancing Act, Plan Trims Health Programs, 3 Cabinet-Level Departments*, HOUSTON CHRONICLE, May 19, 1995, at 1.

the compensation arising because of the agency action. The threat of paying compensation may very well work to the detriment of wetland protection and the arbitrary granting of permits for activities in wetland areas.

H.R. 961 includes exceptions to the payment of compensation.[223] The bill states that compensation will not be paid upon the denial of a permit if the agency action is to prevent an identifiable hazard to public health or safety or to prevent damage to specific property other than the property in question.[224] These exceptions are similar to those recognized by the Supreme Court.[225] The Supreme Court has stated that a public purpose is not enough in itself to relieve the government of paying compensation.[226] Additionally, H.R. 961 finds that if the use of the property is a nuisance, as defined by the law of a state, or already prohibited under a local zoning ordinance, then compensation is not required if the Corps denies a permit.[227]

Congress is attempting to compensate landowners based upon a set percentage of loss of viable use.[228] Under H.R. 961, the denial of a permit may constitute a compensable taking. However, due to the extreme differences in the wetland areas that come under the jurisdiction of this bill and the wide range of justifications for the denial of a permit, compensation lines drafted from the chambers of Congress appear arbitrary.

## V. ATTEMPTS TO MODIFY H.R. 961

Republican Congressman Sherwood L. Boehlert from New York offered an amendment to H.R. 961 on May 15, 1995, which the National Governors' Association approved.[229] This amendment would give to states the ability to implement a wetland conservation and permitting

223. H.R. 961, 104th Cong., 1st Sess. § 803(d)(4) (1995).

224. *Id.* § 803(d)(4)(A).

225. *See, eg.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125 (1978) (finding that in instances such as zoning laws where a state tribunal has reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting certain land uses the Court has upheld regulations that destroyed or adversely affected interests in real property).

226. Pennsylvania Coal v. Mahon 260 U.S. 393, 415 (1922). The Court found that the mere existence of a public purpose was insufficient to release the government from the compensation requirement. *Id.* "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation." *Id.*

227. H.R. 961 § 803(d)(3). *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2897 (1992) (determining compensation is not required if the use is a nuisance under state law, and the state must identify background principles of nuisance law prohibiting the landowners' intended use to avoid compensation).

228. H.R. 961 § 803(d).

229. 141 CONG. REC. H4934-09, H4939 (daily ed. May 15, 1995).

plan.[230] According to Congressman Boehlert, the amendment has five main advantages which include: (1) recognizing the needs of farmers; (2) increasing local control; (3) not creating any new regulating entity; (4) speeding the regulatory process; and (5) providing a reasonable appeals process.[231] This amendment would strike Title VIII of H.R. 961 and substitute Title VIII Wetlands Conservation and Management.[232]

The amendment would allow for renewed protection of wetland areas by giving state or local governments the ability to regulate the permit process.[233] The Boehlert amendment received some support; however, the House defeated the amendment by a vote of 185-242.[234] One of the main concerns with the amendment was that it altered the proposed compensation provision of H.R. 961.[235] Some members of Congress understood the need for the protection of wetlands and rigorously supported the amendment.[236] However, the individuals believing that a rigid definition was needed in order to curve the Corps and the EPA from abusing their jurisdictional powers prevailed.[237]

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230. *Id.* at H4935.
231. *Id.* at H4940 (statement of Rep. Boehlert).
232. *Id.* at H4934.
233. *Id.* at H4935.
234. 141 CONG. REC. H4978-01, H4986 (daily ed. May 16, 1995).
235. *Id.* at 4978.
236. *Id.* at 4979. Democratic Congressman Jim Oberstar from Minnesota stated:

> Mr. Chairman, our Nation was rich in wetlands when the settlement of America began. But civilization took its harsh toll: agriculture, highways, railroads, cities, suburbs, exurbs, flood control, destroying the wetlands along our Nation's major riverways and our coastal waterways. All in the interest of progress and without concern for an understanding of the enormous power and strength of the wetlands as a filtering device, preventing sediment from getting into the streams, preventing pollution from getting into our major waterways, estuaries, and lakes.
>
> By the time I was elected to Congress in the mid-1970s, the lower 48 States had been diminished in wetlands by half. Our migratory waterfowl have declined in numbers over the years, and few are here in the Chamber today who can remember, but all of us surely should have studied the dust bowl days of the 1930s caused, not by drying up of the rains, but by man's thoughtless and senseless use and overuse of the land, draining the wetland-rich prairie pothole region of America's midsection.
>
> One-third of our endangered and threatened species are sheltered by wetlands.

*Id.*

237. *Id.* at H4980. Republican Congressman Tom Latham from Iowa stated:

> First of all, let me say that everyone who will speak against this amendment today shares a commitment to protecting genuine wetlands. The key issue, as I hope to demonstrate in a moment, is how broadly a wetland is defined. Because if you are a bureaucrat with the EPA or other Federal agency, wetland does not mean something is a pond or a bog or a swamp or a marsh. In fact, over the last eight years, we have seen areas defined as wetlands where water never actually stands or where there is a low spot in a cornfield, and regulators, in their never ending search for more control, have stretched laws designed to affect navigable waters so that they can regulate farmland in north central Iowa that is at least 100 miles from any navigable water. That is how the environmental extremists come up with their astonishing claims about wetlands being left unprotected by this bill.
>
> In the ideal world the overwhelming majority of Americans currently live in areas

## VI. CONCLUSION

Clearly, from the actions of Congress in the last legislative session, there is a desire and urgency on the part of its members to modify and amend the Clean Water Act. H.R. 961, Title VIII will have a devastating effect on existing wetland areas. The rigid classification system will allow for the filling of numerous wetland areas. Although Congress has recognized the importance of Type A wetlands, by subjecting Type A wetlands to a cap, Congress still only recognizes a certain percentage of Type A wetlands as worthy of extended protection. The wetlands above this cap presumably have the same characteristics as others in the area, yet because of the cap, those areas will be subject to a less stringent permit process.

The compensation system of H.R. 961 will cost this country and will influence decision makers in the permit process. The pressure of monetary payments in a time of cutting expenses will influence decision makers when faced with a permit for the filling of a wetland area. The wetland protection that this country recently witnessed under the Clean Water Act may take a step backward because of the threat of compensation for each permit denial.

After analyzing H.R. 961 and the attempts to modify its broad sweeping regulations, as in the Boehlert amendment,[238] what Congress sought to pass and passed was a bill that will have devastating effects on the wetlands of this country. Wetlands are valuable to the environment and to the existence of a diverse ecosystem. However, according to some estimates, a large percentage of this country's wetlands will be subject to destruction as a result of H.R. 961.[239] As previously stated, the mission of the Clean Water Act is "to maintain the chemical, physical, and

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> that could be defined as wetlands. If you define everything as a wetland, no matter how against common sense that definition may be, you can pretty much give yourself the right to regulate what every American does with his or her property.

*Id.*

238. *See supra* notes 229-233 and accompanying text (containing Boehlert's recommendations and proposed amendment).

239. 141 CONG. REC. H4978-01, H4978 (daily ed. May 16, 1995) (statement of Rep. Borski). Democratic Congressman Borski from Pennsylvania stated:

> The bill will eliminate protection for 60 to 80% of the existing wetlands. In my State of Pennsylvania, 40% of all wetlands will be removed from protection, including more than 150,000 acres of floodplain wetlands that protect Chesapeake Bay from polluted runoff. In New Jersey, 35 to 50% of all wetlands would lose protection. In Delaware, more than 50% of the wetlands would lose protection. H.R. 961 decides, without regard to science, what wetlands will be protected and which will not.

*Id.*

biological integrity of the Nations waters."[240] Since wetlands constitute our "Nations waters," H.R. 961 clearly contradicts the essence of the Clean Water Act by sacrificing an invaluable and irreplaceable national resource.

Consequently, some have coined this act as the "Dirty Water Act."[241] Whether H.R. 961 will live up to what its critics have called it remain to be seen, but by allowing for the destruction of wetlands, the Act is well on its way. Therefore, this author urges President Clinton to veto H.R. 961 or, alternatively, encourages the Senate to rewrite its provisions.

*Steven W. Watkins*[242]

240. *See* 33 U.S.C. § 1251 (1988) (discussing the purpose of the Clean Water Act).

241. Scott Collins, *Environmentalists Say Clean Water Act Revisions Threaten Bay, Wetlands*, LOS ANGELES TIMES, May 21, 1995, at J3.

242. The author would like to thank his wife, Allison, for her support and encouragement over the last three years.